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**PUBLIC SERVICE
COMMISSION**

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:

**PETITION OF NPCR, INC. d/b/a
NEXTEL PARTNERS FOR
DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER
IN THE COMMONWEALTH OF KENTUCKY**

CASE NO. 2003-00143

**REPLY BRIEF OF NPCR, INC. d/b/a NEXTEL PARTNERS
IN SUPPORT OF APPLICATION FOR DESIGNATION AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER**

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners" or the "Company") submits this reply brief in support of its Petition for designation as a federal eligible telecommunications carrier ("ETC").

I. INTRODUCTION

Nextel Partners has provided evidence demonstrating that it meets the basic requirements to be designated as an ETC in portions of the Commonwealth of Kentucky. In addition, Nextel Partners has demonstrated that its designation will serve the public interest in areas currently served only by incumbent rural ETCs. These benefits – the benefits of competitive entry, the service extension and service commitments embraced by the Federal Communications Commission ("FCC") in the *Virginia Cellular* decision, and the increased consumer benefits that will come with a faster, more complete build-out of high-cost rural areas, all serve the public interest. Nextel Partners respectfully requests the Commission approve its Petition as requested, subject to the commitments and conditions it has proposed in this proceeding.

II. ARGUMENT

A. INTERVENORS' NON-SUBSTANTIVE ARGUMENTS SHOULD BE DISMISSED

Intervenors seek to deny their customers benefits of a competitive universal service provider by making two non-substantive arguments that have nothing to do with ETC designation. The Commission should reject these arguments and resolve the Petition on the merits.

First, Intervenors assert that NPCR, Inc. is unlawfully doing business in the Commonwealth of Kentucky. (ITG Br., p. 4.) This assertion is untrue. "Nextel Partners" is registered as the assumed name for Kentucky for NEXTEL WIP Lease Corp. This is shown on Exhibit A. NEXTEL WIP Lease Corp., like NPCR, is a corporate entity under the "Nextel

Partners, Inc." corporate umbrella. NEXTEL WIP Lease Corp. was registered in 1999 and is the entity that enters into cell tower construction leases in Kentucky. When NPCR was registered to be the telecommunications operating entity in Kentucky, the Secretary of State informed NPCR that it would not allow an assumed name to be recorded as assigned to more than one corporate entity. The fact is, then, that NPCR has provided the appropriate information to the Secretary of State, and the "Nextel Partners" name is clearly associated with the Nextel Partners, Inc. corporate umbrella in filings with the Secretary of State's office. Moreover, this issue was never raised at the hearing, and thus the factual record made before the Commission does not support these arguments. The Commission should decline Intervenors' request to deny the Petition on this basis.

Next, Intervenors seek to have the Petition denied based on alleged misstatements in the Petition. (ITG Br., p. 4.) These arguments should be rejected. In its Petition, discovery, and at the hearing, Nextel Partners was honest and forthright regarding the differences between its licensed service territory and its signal propagation. Mr. Manning's statements made in support of the Petition were qualified by signal propagation maps that demonstrated the scope of actual coverage. (Petition, Attachment 2.) Intervenors are simply incorrect in their suggestion that Nextel Partners failed to accurately disclose its service areas in Kentucky.

Similarly, Intervenors question Nextel Partners' honesty based on statements that Nextel Partners provides services using its own facilities. (ITG Br., p. 6.) Again, this should not be an issue. An applicant for ETC designation must demonstrate that it provides services using, at least in part, its own facilities.¹ 47 C.F.R. § 54.201(d)(1). The term "own facilities" includes facilities leased from other carriers. 47 C.F.R. § 54.201(f). Nextel Partners' statement in this

¹ In other words, a carrier that provides service via total resale is ineligible to be designated as an ETC. 47 C.F.R. § 54.201(i).

regard is accurate – Nextel Partners provides service using switches, cell sites, and other facilities leased from third-party carriers, all of which qualify as the Company's "own facilities" under the FCC's Rules. The fact that Nextel Partners leases transmission facilities from third-party carriers in some areas is not germane to this proceeding.

Nextel Partners respectfully requests that the Commission reject these non-substantive arguments and proceed to resolve this issue on the law and the facts.

B. NEXTEL PARTNERS SATISFIES THE BASIC ELIGIBILITY CRITERIA OF 47 U.S.C. § 214(e)(1)

1. Nextel Partners Provides the Supported Services

Nextel Partners' Post-Hearing Brief demonstrated, based on the record evidence, that it can and will provide the FCC's supported services to customers in the Commonwealth of Kentucky. (Nextel Partners Br., pp. 6-10.) Intervenors have not addressed Nextel Partners' provision of the supported services, and thus concede Nextel Partners' evidence and argument.

2. Nextel Partners Will Satisfy Advertising Requirements

Nextel Partners' opening brief demonstrated the manner in which it committed to satisfy advertising obligations imposed on ETCs. (Nextel Partners Br., p. 10.) An applicant for ETC designation must only commit to advertising using media of general distribution. 47 U.S.C. § 214(e). Intervenors argue that Nextel Partners fails to meet this requirement by asserting that Nextel Partners' current advertising plans are insufficient. (ITG Br., p. 7.) There are, however, no federal or state standards that govern advertising conducted by federal ETCs. The FCC determined that such standards are unnecessary because a competitive ETC obtains support only if it succeeds in attracting customers.² If either the Commission or the FCC does adopt specific standards applicable to ETCs, Nextel Partners will comply with those standards.

² *Universal Service Order*, ¶ 148 (ETCs have strong incentives to advertise).

In addition, the evidence supports a finding that the NEXTEL name is advertised throughout the Commonwealth. Nextel Partners provided data responses after the hearing that demonstrated a significant amount of advertising directed at areas throughout Kentucky, including in all of the rural telephone company service areas at issue in this proceeding. (*See* Response to Requests Made at Hearing (filed June 10).) This Kentucky-specific information was in addition to the national advertising that reaches consumers in these areas via television, event sponsorships, and national print media. (*Id.*)

Finally, with regard to Lifeline, the FCC recently adopted rules that require federal ETCs to do more outreach and advertising of Lifeline service than has previously been the case. *See In the Matter of Lifeline and Link-up*, WC Docket No. 03-109, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-87 (rel. April 29, 2004). As Mr. Peabody stated at the hearing, the Company is already starting to pursue implementation of these standards. (Tr. 79.) The Commission should find that Nextel Partners can and will meet advertising requirements imposed on ETCs throughout its requested service areas in the Commonwealth of Kentucky.

3. **Nextel Partners Will Offer Lifeline in Accordance with Federal Law**

Nextel Partners has committed to participate in Lifeline and Link-Up programs in accordance with federal law. (Peabody Direct, pp. 11-12; Peabody Rebuttal, p. 3.) Intervenors nonetheless attempt to disqualify Nextel Partners based on the provision of Lifeline and Linkup services to low income consumers. These arguments should be rejected.

Intervenors question Nextel Partners' commitment to provide Lifeline service because Mr. Peabody testified that Nextel Partners is not providing Lifeline service today in Kentucky. (ITG Br., p. 8.) This argument is a red herring. Until a carrier has been designated as an ETC, it may not lawfully provide Lifeline service. Said another way, until Nextel Partners is designated

in Kentucky, it is not eligible to receive low-income discounts that could be passed through to consumers. *See* 47 C.F.R. § 54.407 (support provided only to eligible telecommunications carriers). A similar issue was previously addressed by the FCC:

The Alabama Rural LECs suggest that RCC Holdings must supply proof as to how it intends to comply with the rules requiring an ETC to publicize the availability of its Lifeline and Linkup services. The publicity rules for Lifeline and Linkup services, however, apply only to already-designated ETCs. Accordingly, RCC Holdings will not be required to publicize Lifeline and Linkup until it is designated as an ETC. Therefore, at this time, it is sufficient that RCC Holdings commits to advertising the supported services using media of general distribution. Moreover, as we have stated in prior decisions, because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated service area.

In the Matter of Federal State Joint Board on Universal Service, RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier, CC Docket No. 96-45, *Memorandum Opinion and Order*, DA 02-3181 ¶ 21 (rel. Nov. 27, 2002) (emphasis added).

Nextel Partners is ready, willing, and able to offer Lifeline and Link-Up services upon designation, and should not have its Petition denied simply because it is not lawfully authorized to provide Lifeline services today.

Second, Intervenor critics Nextel Partners because of its anticipated rates for a Lifeline service offering. Nextel Partners recognizes that its Lifeline service will be more expensive than Intervenor's. Nonetheless, Nextel Partners is required under federal regulations to price its lifeline service based on its least cost generally available offering, less the appropriate discount. 47 C.F.R. § 54.513(a). Nextel Partners has committed to following this mandatory federal law. (Peabody Direct, pp. 11-12.) By attacking Nextel Partners' rates, Intervenor is attacking the FCC's Rules implementing this program.

As Mr. Peabody noted at the hearing, Nextel Partners is currently offering Lifeline service in the State of Indiana, where it was designated just six weeks prior to the hearing in this case. (Tr. 65-66.) Nextel Partners proposes that it be ordered to file, within fifteen days of designation, a Lifeline and Link-Up tariff for the Commonwealth of Kentucky. Nextel Partners would file any changes to the rates, terms and conditions on a going-forward basis. The Commission should find this to be sufficient to meet the requirement to provide Lifeline and Link-Up services in conformance with federal law.

**C. NEXTEL PARTNERS' ETC DESIGNATION IN THE BELL SOUTH/
VERIZON WIRE CENTERS IS UNDISPUTED AND SHOULD BE
GRANTED**

Nextel Partners satisfies all of the basic Section 214(e) criteria for ETC designation in the BellSouth and AllTel wire centers. Neither BellSouth nor AllTel intervened or opposed the Petition. Under Section 214(e)(2), the Commission "shall" grant ETC designation in such circumstances. Indeed, this Commission previously designated e-Tel as an ETC in non-rural telephone company areas where its Petition demonstrated its compliance with the eligibility requirements of Section 214(e).³ Thus, consistent with the Act and the Commission's prior ruling in *e-Tel*, the Commission should grant Nextel Partners' request for ETC designation in the BellSouth and AllTel wire centers.

D. NEXTEL PARTNERS HAS SOUGHT APPROPRIATE SERVICE AREAS

Nextel Partners explained in its opening brief that it seeks designation in areas where it is licensed to provide service, and where it undertakes the commitment to provide universal services as a federal ETC. (Nextel Partners Br., p. 12.) The FCC has made abundantly clear that

³ *e-Tel Order*, pp. 1-3.

a new entrant that is in the process of completing its network build-out need not have complete coverage, and may not be capable of finalizing business plans prior to ETC designation.

Moreover, a new entrant cannot reasonably be expected to be able to make the substantial financial investment required to provide the supported services in high-cost areas without some assurance that it will be eligible for federal universal service support. In fact, the carrier may be unable to secure financing or finalize business plans due to uncertainty surrounding its designation as an ETC.

Petition for Preemption of an Order of the South Dakota Public Utilities Commission, CC Docket 96-45, *Declaratory Ruling*, FCC 00-248, ¶ 14 (rel. Aug. 10, 2000). Nonetheless, Intervenor seeks the denial of Nextel Partners' application for just this reason.

While Nextel Partners is incapable at this time of providing a plan to fully build out through these areas, Mr. Peabody made clear that the Company wants to extend service into these areas, is willing to undertake the special commitments of ETC designation in these areas. (Tr. 85; Peabody Direct, pp. 18-19.) This build-out will occur more slowly (if at all) without access to high-cost universal service funds. (*Id.*) Nextel Partners' commitment and evidence of ability to serve these areas over time is appropriate under law and consistent with business realities that exist, as companies determine where to spend scarce capital resources.

If Nextel Partners is designated as an ETC, the Commission will need to certify to the FCC and the Universal Service Administrative Corporation that Nextel Partners will use federal universal service funds received in 2005 for the purposes for which they are intended. *See* 47 C.F.R. § 54.314. To support such a certification, Nextel Partners submits Exhibit B hereto, which is an Affidavit of Donald J. Manning. This Affidavit commits the Company to using high-cost funds in 2005 to construct at least four cell sites that would be within or that would serve areas currently served by rural telephone companies affected by this Petition. (Manning Aff., ¶ 4.) In addition, Nextel Partners commits to build at least fifteen cell sites in areas served by non-rural telephone companies in 2005 and early 2006. (Manning Aff., ¶ 5.) In addition to

these specific commitments, Nextel Partners will commit to reviewing 2005 build-out progress with staff as it is occurring, and to identify further specific projects that will be completed in 2006. (Manning Aff., ¶ 6.)

The Commission should accept Nextel Partners' commitments to serve as an ETC in these areas, and hold Nextel Partners to those commitments. The cost of these 2005 build-out commitments will be approximately five times the amount of support Nextel Partners would expect to receive in 2005.⁴ Nextel Partners' requested service areas are consistent with the law and serve the public interest.

C. NEXTEL PARTNERS' ETC DESIGNATION IN AREAS SERVED BY THE RURAL TELEPHONE COMPANIES IS IN THE PUBLIC INTEREST

In its opening brief, Nextel Partners described the appropriate considerations for a public interest examination under Section 214(e) of the 1996 Act. (Nextel Partners Br., pp. 13-24.) Nextel Partners demonstrated, with reference to the record evidence, that its services and commitments, along with understood preferences for competitive markets, clearly showed that consumers in Kentucky stand to benefit if Nextel Partners is designated as a competitive ETC. Intervenor's brief fails to identify any consumer harms that would result from designating Nextel Partners as a competitive ETC. Instead, Intervenor's main argument is that Nextel Partners has not yet extended its network throughout these rural telephone company service areas. (ITG Brief, p. 11.) The Commission should reject Intervenor's arguments and take action that will provide the greatest benefit for customers in Kentucky.

⁴ Fourteen cell sites times \$200,000-\$250,000 per site equals approximately \$3,000,000. Nextel Partners anticipates receiving federal support of \$150,000 per quarter, or \$600,000 per year. (Tr. 89.)

Nextel Partners has demonstrated an exceptional commitment to the Commonwealth of Kentucky. Nextel Partners has spent approximately \$20 million to acquire licenses to serve nearly every portion of Kentucky.⁵ (See Response to Information Requests made at Hearing, p. 2.) Nextel Partners has spent \$15 million constructing a switch in Lexington and has a significant employee base in the Commonwealth. (*Id.*) Nextel Partners is a new entrant in the market, having rapidly built out its state-of-the-art digital facilities while maintaining a level of efficiency and customer satisfaction that is at the top of the industry. (Peabody Rebuttal, p. 5 and Peabody Exhibit 12.) Nextel Partners is well suited to continue pursuing its goal of being the telecommunications provider of choice throughout Kentucky.

As a new entrant, however, build-out is not complete. The way in which Nextel Partners' build-out will be completed, mirrors how Intervenors built out and depends on the availability including access to high cost universal service support. As Mr. Wood stated:

ILECs built out their networks, over time, in exactly the same way: they began with construction where the most people were, and expanded outward from that point. The key distinction between ILEC network expansion and Nextel Partners' buildout to date is that the ILECs made their investments while receiving USF support (either implicitly or explicitly).

Nextel Partners now seeks to expand its geographic coverage and reinforce its service quality in order to bring service to people in rural areas that is comparable to service available to people in urban areas. This is the investment that is made possible, whether the carrier is an IETC or CETC, through USF support.

(Wood Rebuttal, p.28 (emphasis added).) The availability of universal service funds can and will be used to extend Nextel Partners' build-out in Kentucky. The Commission will do the most good for its constituents by allowing these funds to be used for these intended purposes.

⁵ The only licenses Nextel Partners has not acquired are urban counties in the Cincinnati metropolitan area that are served by Nextel Communications. (Tr. 75.)

Finally, as a new entrant, Nextel Partners' current customer base in the ITG Companies' service areas will provide only minimal federal universal service support. It would have been easy for Nextel Partners to focus this Petition only on the BellSouth and AllTel areas and avoid the service commitments that will necessarily go along with an ETC designation in the more rural hard-to-serve areas. Nextel Partners has accepted the more difficult challenge. This Commission should recognize that this represents a more substantial and more real commitment to high cost areas of Kentucky. To serve the public interest, and to give rural Kentucky the best opportunity to obtain high quality competitive services, the Commission should accept Nextel Partners' commitments and approve its Petition.

CONCLUSION

For the above reasons, Nextel Partners respectfully requests that the Commission grant its Petition as requested.

Respectfully submitted,

FROST BROWN TODD LLC

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*COUNSEL FOR APPLICANT NPCR, INC. d/b/a
NEXTEL PARTNERS*

CERTIFICATE OF SERVICE

I, Keith Moorman, an attorney with the law firm of Frost Brown Todd, LLC, hereby certify that on this the 2nd day of August, 2004, I caused a true and complete copy of the foregoing to be sent via U.S. Mail, postage-prepaid, to the following:

James Dean Liebman
P.O. Box 478
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Lexington, KY 40588-1650



Keith Moorman

EXHIBIT A

Organization Number 0479468
Name NEXTEL WIP LEASE CORP.
Profit or Non-Profit P - Profit
Company Type FCO - Foreign Corporation
Status A - Active
Standing G - Good
State DE
File Date 8/27/1999
Authority Date 8/27/1999
Last Annual Report 3/25/2004
Principal Office 4500 CARILLON POINT
KIRKLAND, WA 98033
Registered Agent CSC LAWYERS INCORPORATING SERVICE
421 W MAIN ST
FRANKFORT, KY 40601

Current Officers

President John Chapple
Secretary Donald J Manning
Treasurer Barry Rowan
Director Timothy M Donahue

Assumed Names
NEXTEL PARTNERS

Status
Active

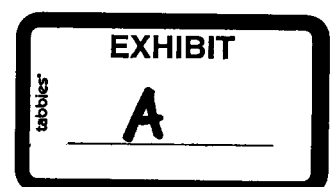


EXHIBIT B

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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

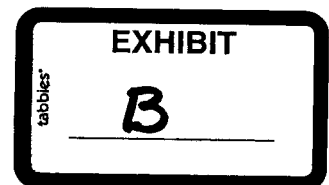
IN THE MATTER OF:)	
)	
PETITION OF NPCR, INC. d/b/a)	
NEXTEL PARTNERS FOR)	CASE NO. 2003-00143
DESIGNATION AS AN ELIGIBLE)	
TELECOMMUNICATIONS CARRIER)	
IN THE COMMONWEALTH OF KENTUCKY)	

AFFIDAVIT OF DONALD J. MANNING

STATE OF WASHINGTON)
) ss.
COUNTY OF King)

Donald J. Manning, being first duly sworn on oath, states as follows:

1. I am Vice President and General Counsel for Nextel Partners, Inc. and its subsidiaries, including NPCR, Inc.
2. I make this Affidavit in support of NPCR, Inc.'s request that the Kentucky Public Service Commission ("Commission") certify NPCR in accordance with 47 C.F.R. § 54.314 for receipt of Universal Service Funds for calendar year 2005.
3. If NPCR is designated as an eligible telecommunications carrier by the Commission, NPCR will use universal service funds received in 2005 for the provision, maintenance, and upgrading of facilities and services for which this support is intended, as designated by the Federal Communications Commission consistent with Section 254(e) of the Federal Telecommunications Act.



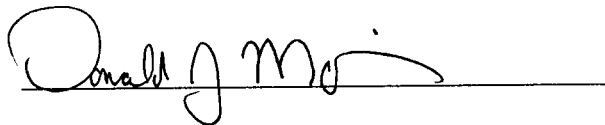
4. If designated as an ETC so that funding can be received for the entire 2005 calendar year, NPCR commits to constructing at least four cell sites in 2005 that are within or provide coverage to rural telephone company study areas within which NPCR seeks designation.

5. NPCR further commits to construct at least fifteen cell sites in 2005 and early 2006 within non-rural telephone company areas in the Commonwealth.

6. NPCR commits to providing similar information to the Commission prior to seeking certification for funds for calendar year 2006. NPCR will meet with staff to reviewing federal universal service funds available in areas of Kentucky, and to explain its plans for further build-out into the areas not currently served by NPCR's network. At that time, or earlier if requested by Staff, NPCR will provide a summary of infrastructure investments and projects made or expected to be made in Kentucky in 2005.

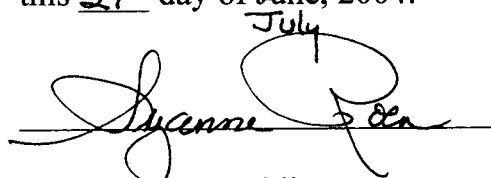
7. NPCR hopes and expects that ETC designation will NPCR to expedite the build-out of its network in Kentucky for the benefit of rural consumers in the Commonwealth.

FURTHER YOUR AFFIANT SAYETH NOT.

A handwritten signature in cursive script, appearing to read "Donald J. Manning", written over a horizontal line.

DONALD J. MANNING

Subscribed and sworn to before me
this 29th day of ~~June~~ ^{July}, 2004.

A handwritten signature in cursive script, appearing to read "Suzanne W. Roen", written over a horizontal line.

Notary Public

